C&H
Curtin & Heefner LLP
ATTORNEYS AT LAW

2005 S. EASTON ROAD • SUITE 100 • DOYLESTOWN, PA 18901
(267) 898.0570 • (800) 773.0680 • FAX (215) 340.3929
WWW.CURTINHEEFNER.COM
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MARK L. FREED
MLF@curtinheefner.com

May 31, 2018

Via Electronic Filing

Rosemary Chiavetta, Esquire
Secretary
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Pennsylvania State Senator Andrew E. Dinniman v. Sunoco Pipeline, L.P.
Docket Nos. C-2018-3001451 and P-2018-3001453

Dear Secretary Chiavetta:

Attached for filing is Senator Andrew E. Dinniman's Answer to Sunoco Pipeline, L.P.'s Preliminary Objections to be filed in the above-referenced matter.

Thank you.

Very truly yours,

Mark L. Freed
For CURTIN & HEEFNER LLP

MLF:jmd
Enclosure
cc: The Honorable Elizabeth Barnes (via email: ebarnes@pa.gov)
Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA STATE SENATOR ANDREW E. DINNIMAN,	:	
Complainant,	:	Docket No.: C-2018-3001451 Docket No.: P-2018-3001453
v.	:	
SUNOCO PIPELINE, L.P.,	:	
Respondent.	:	

SENATOR ANDREW E. DINNIMAN'S ANSWER TO SUNOCO PIPELINE, L.P.'S PRELIMINARY OBJECTIONS

COMES NOW, Petitioner, Senator Andrew E. Dinniman (hereinafter "Senator Dinniman" or "Complainant"), by and through his attorneys, Curtin & Heefner LLP, pursuant to 52 Pa. Code § 5.101(f)(1), and respectfully files this Answer to Preliminary Objections, and in support thereof avers the following:

I. INTRODUCTION

1. Admitted in part and denied in part. It is admitted only that Complainant brings this action in his official capacity. It is denied that Complainant lacks standing to bring this Complaint. On the contrary, as Administrative Law Judge Elizabeth Barnes has already ruled, Complainant has standing and that Sunoco's motion to dismiss for lack of standing is denied. *See Pennsylvania State Senator Dinniman v. Sunoco Pipeline*, L.P., PUC Docket Nos. P-2018-30011453, C-2018-30011451 (May 21, 2018). The Commission has also already found that:

> As a formal complainant in his own proceeding, ***Senator Dinniman has full party status and may proceed with litigation before the Commission*** including exercising the right of discovery, the

> presentation of testimony and evidence, and the cross-examination of opposing witnesses.

Petition of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission for the Issuance of an Ex Parte Emergency Order, PUC Docket No. P-2018-3000281, (May 3, 2018) at 12 (emphasis added). Previously, in *Application of Artesian Water Pennsylvania, Inc.*, PUC Docket No. A-2014-2451241 (March 13, 2015), two PUC administrative law judges also found that Complainant had direct, immediate and substantial interest in that matter and granted him party status.

By way of further response, standing to participate in proceedings before an administrative agency ***is primarily within the discretion of the agency***. *Pennsylvania Natural Gas Association v. T.W. Phillips Gas and Oil Co., 75 Pa. PUC 598* (1991) (emphasis added). Legislators are granted standing in their official capacity to challenge agency actions that may implicate their legislative functions. *Fumo v. City of Philadelphia*, 972 A.2d 487, 497 (Pa. 2009); *Corman v. NCAA*, 74 A.3d 1149, 1161 (Pa. Cmwlth. 2013). *See also Senator Vincent J. Fumo v. Bell Atlantic – Pennsylvania, Docket No. I-00980080,* Complaint filed October 19, 1998*; Rydal-Meadowbrook Civic Ass'n v. Pa. Pub. Util. Cmm'n,* 173 Pa. Super. 380, 98 A.2d 481 (1953). This matter concerns Complainant's "unique legislative prerogatives" and his interests far exceed those "common to the general citizenry". He represents a Senatorial District directly impacted to the project at issue in this matter. In his role as Senator, he sits on numerous Senate Committees responsible for water protection and public safety, including the standing Senate Environmental Resources and Energy Committee and the Joint Legislative Air and Water Pollution Control and Conservation Committee. He has the statutory authority to receive, review and comment upon the Governor's annual expenditure plan for the Environmental Stewardship Fund under 27 Pa.C.S. § 6104, which funds in part the Chester County Conservation District and

its oversight of the watersheds and water supply of West Whiteland Township, and he receives annual, mandatory reports from the Commission under the Pennsylvania Public Utility Code. 66 Pa.C.S. §§ 320. And, in his official capacity as Senator, he served as a member of the Pennsylvania Pipeline Infrastructure Task Force, a group of experts and stakeholders that recommended policies, guidelines and best practices to guide expansion of pipeline infrastructure in the Commonwealth. Complainant is also a resident of West Whiteland Township and a former County Commissioner, he possesses knowledge of a local perspective and the potential effects essential to a determination.

2. Denied. It is denied that Complainant has failed to join any necessary parties to this action. As in *Com., Dept. of Transp. v. Pennsylvania Power & Light Co.*, 383 A.2d 1314, 1317 (Pa. Cmwlth. 1978), Sunoco bases this argument solely on alleged financial agreements related to the project. *See also Pennsylvania Fish Commission v. Pleasant Tp.*, 388 A.2d 756 (Pa. Cmwlth. 1978) (Pennsylvania Department of Transportation was ***not*** a necessary party). Such parties do not have "rights so connected to the claims of the litigants." Furthermore, Sunoco's expansive view of necessary parties were accepted (i.e. anyone with a contract related to the material to be placed in the pipeline, including countless landowners who allegedly are to receive royalties) would require that hundreds of parties be joined to this action. Finally, the various parties Sunoco claims are necessary parties have received notice of Complainant's action. In fact, a number of them, including Range Resources and a representative of a labor union, testified in the hearing on the Petition for Interim Emergency Relief. Yet, despite this knowledge, to date only one of these so called "necessary parties" (Range Resources filed a request for intervention today, May 31, 2018) have even attempted to intervene in this matter.

3. Denied. It is denied that the Complaint is legally insufficient. By way of further response, for the purpose of evaluating the legal sufficiency of the challenged pleading, all well-pleaded, material, and relevant facts alleged in the complaint and every inference that is fairly deducible from those facts must be accepted as true. *Mazur v. Trinity Area School Dist.*, 961 A.2d 96, 101 (Pa. 2008); *Marinoff v. Bell Telephone Co. of Pennsylvania*, 75 Pa. PUC 489, 491 (1991). A demurrer can only be sustained where the complaint is clearly insufficient to establish the pleader's right to relief. *Firing v. Kephart,* 353 A.2d 833 (Pa. 1976). If there is any doubt as to whether the preliminary objection should be sustained, that doubt should be resolved in overruling the demurrer. *Clevenstein v. Rizzuto*, 266 A.2d 623 (Pa. 1970); *Adams v. Speckman*, 122 A.2d 685 (Pa. 1956). The tribunal cannot consider matters collateral to the complaint, but must limit itself to such matters as appear therein, and an effort to supply facts missing from the objectionable pleading makes the preliminary objection in the nature of a demurrer an impermissible "speaking demurrer." *Armstrong County Memorial Hosp. v. Department of Public Welfare*, 67 A.3d 160 (Pa. Cmwlth 2013).

a. Denied. "Illegality" is not a proper basis for a preliminary objection. *See DeAngeles v. Laughlin*, 258 A.2d 615 (Pa. 1969). By way of further response, Complainant has properly alleged that under 52 Pa. Code § 59.33(a) that Sunoco is to "at all times use every reasonable effort to properly warn and protect the public from danger and shall take reasonable care to reduce the hazards to which employees, customers and others may be subjected by reason of its equipment and facilities." Complainant has requested that "Sunoco fully conduct[] and release[] to the public a written integrity management program, risk analysis and any other information required to warn and protect the public from danger and to reduce the

hazards to which the public may be subjected by reason of MEI, ME2 and ME2X . . . ." The Public Utility Confidential Security Information Disclosure Act does not prevent Sunoco from releasing any information. Furthermore, Complainant does not seek the release of confidential information. Rather, to comply with Complainant's request, Sunoco can redact any confidential security information or prepare documents that exclude the confidential security information, and release and/or prepare such other non-confidential security information as is required to warn and protect the public from danger and to reduce the hazards to which the public may be subjected. Rather than provide this information, Sunoco has chosen to hide behind the claims of "security" to produce virtually none of the requested information.

b. Denied. 49 CFR § 195.210(a) of the federal Pipeline and Hazardous Materials Safety Administration (PHMSA) regulations, incorporated by reference into the PUC regulations at 52 Pa. Code 59.33(b), provides that a "[p]ipeline right-of-way must be selected to avoid, as far as practicable, areas containing private dwellings, industrial buildings, and places of public assembly." Amended Complaint, ¶ 78. The Complaint alleges that Sunoco has failed to "avoid areas in and around West Whiteland Township containing private dwellings and places of public assembly. On the contrary, the ME2 and ME2X right of way goes directly through the yards and curtilage of private dwellings. The result has been to impact, and will continue to risk impact to, private water supplies, houses and other buildings, their foundations, and their occupants."

By way of further response, it is denied that these claims are barred by the doctrine of laches. Laches "should never be declared unless the existence thereof is clear on the face of the record." *In re Marushak's Estate*, 413 A.2d 649 (Pa. 1980). Sunoco's allegations are not based on the face of the record. In addition, the key events that prompted the Complaint did not arise until the summer of 2017 (i.e., the inadvertent returns) and did not culminate until November 2017 and March of 2018 (i.e., the development of sinkholes that, among other things, exposed ME1). It is also denied that Sunoco has been prejudiced. Sunoco has been on notice of opposition to the pipeline from its outset. It has been the subject of numerous lawsuits. See, e.g., *Clean Air Council v. Sunoco Pipeline, L.P.*, C.C.P. Philadelphia, Docket No. 150803484 (filed August 2015); *Clean Air Council, et al. v. Sunoco Pipeline*, L.P., EHB Docket No. 2017009 (filed February 2017); *Delaware Riverkeeper Network v. Sunoco Pipeline, L.P.*, C.C.P. 2017-05040 (filed May 2017) (challenging siting of pipelines); *Flynn v. Sunoco Pipeline*, L.P., C.C.P. Delaware County, Docket No. CV-2017-004148 (filed May 2017) (challenging siting of the pipelines). Sunoco has been well aware of this opposition and yet chose to proceed with construction at its own risk. Furthermore, Sunoco defended the actions in *Delaware Riverkeeper Network* and *Flynn*, by arguing that challengers' relief is before the Commission. Having directed challengers to Commission, it cannot now claim prejudice from challengers pursuing their action in the forum Sunoco demanded.

c. Denied. Count IV alleges that ME1 violates the PHMSA regulations that require that ME1 be located 48 feet underground West Whiteland Township, and that

MEl is located at or around 24 inches or less, not 48 inches or more, within West Whiteland Township. 49 CFR §195.200 provides that "[t]his subpart prescribes minimum requirements for constructing new pipeline systems with steel pipe, and for ***relocating, replacing, or otherwise changing existing pipeline systems*** that are constructed with steel pipe." (emphasis added). ME1 has been "changed" in two ways. First, In 2014, ME1 was changed to a Hazardous Liquids pipeline. (Complaint, ¶ 24). In addition, ME1 is not separate and distinct from ME2/ME2X. Rather, by Sunoco's own admission, ME2/ME2X is an "expansion" of its existing pipeline systems. Furthermore, the failure of ME1 to comply with what are indisputably modern pipeline standards, increases the risk of damage to the pipeline resulting from the construction activities associated with ME2 and ME2X and the risk of harm of residents and homes within West Whiteland Township. (Complaint, ¶¶ 86, 87).

d. Denied. It is denied that either the Commonwealth Court or the Commission has conclusively examined the question of whether Sunoco is a public utility for the purposes of ME1 or ME2/2X. The cases relied on by Sunoco involve condemnation proceedings. It is well established that the authority of the courts to review certificates in such a proceeding is extremely limited and that the court has no authority "to review the public need for a proposed service by a public utility . . . ." *See, e.g., In re Sunoco Pipeline, L.P.*, 143 A.3d 1000, 1018 (Pa. Cmwlth 2016). Furthermore, it is denied that the opinions and orders cited by Sunoco resolve the question of whether the Mariner East pipelines are public utility facilities.

II. ARGUMENT

A. Legal Standard

4. Admitted in part and denied in part. It is admitted that under the Commission's regulations, preliminary objections are available to parties and may be filed in response to a pleading. 52 Pa. Code § 5.101(a). It is further admitted that "Commission preliminary objections, pursuant to 52 Pa.Code § 5.101, are analogous to preliminary objections pursuant to Rule 1028 of the Pennsylvania Rules of Civil Procedure in civil practice." *Bruce D. Heffner v. PPL Electric Utilities Corporation*, PUC Docket No. C-2016-2547516, 2017 WL 660609 (Initial Decision, January 17, 2017). By way of further response, preliminary objections before the Commission are limited to:

a. Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
b. Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
c. Insufficient specificity of a pleading.
d. Legal insufficiency of a pleading.
e. Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
f. Pendency of a prior proceeding or agreement for alternative dispute resolution.
g. Standing of a party to participate in the proceeding.

52 Pa.Code § 5.101(a). "[W]hen the sustaining of defendants' preliminary objections will result in a denial of plaintiffs' claim, or a dismissal of plaintiffs' suit, preliminary objections should be sustained only in cases which are clear and free from doubt." *Dana Perfumes Corp. v. Greater*

Wilkes-Barre Indus. Fund, Inc., 375 A.2d 105 (Pa. Super 1977) (q*uoting Borelli v. Barthel*, 211 A.2d 11, 14 (1965)). Preliminary objections "should be sustained only where it appears with certainty, upon the facts averred, the law will not allow the plaintiff to recover." *Id.* (quoting *International Union of Operating Engineers v. Linesville Construction Co.*, 322 A.2d 353, 356 (Pa. 1974). "[W]here any doubt exists, that doubt should be resolved by a refusal to sustain the preliminary objections." *P.J.S. v. Pennsylvania State Ethics Com'n*, 669 A.2d 1105, 1108 (Pa. Cmwlth. 1996) (quoting *J.B. Steven, Inc. v. Board of Commissioners of Wilkens Township*, 643 A.2d 142, 144 (Pa. Cmwlth. 1994), *appeal denied*, 652 A.2d 841 (Pa. 1994)). The remaining averments of this paragraph constitute conclusions of law to which no response is required.

5. Admitted in part and denied in part. It is admitted that in considering preliminary objections, a court must accept the facts alleged in complaint and all reasonable inferences that may be drawn therefrom as true. *Seeton v. Pennsylvania Game Com'n*, 937 A.2d 1028, n. 4 (Pa. 2007). However, the court need not accept as true conclusions of law. *Pittsburgh Nat. Bank v. Perr*, 637 A.2d 334, 336 (Pa. Super. 1994). See also response to Paragraph 4, above. The remaining averments of this paragraph constitute conclusions of law to which no response is required.

B. <u>Answer to Preliminary Objection 1: Senator Dinniman has Standing</u>

6. Denied. On the contrary, as Administrative Law Judge Elizabeth Barnes has already ruled, Complainant has standing and that Sunoco's motion to dismiss for lack of standing is denied. *See Pennsylvania State Senator Dinniman v. Sunoco Pipeline*, L.P., PUC Docket Nos. P-2018-30011453, C-2018-30011451 (May 21, 2018). Furthermore, in its May 3, 2018 Order regarding the *Petition of the Bureau of Investigation and Enforcement of the Pennsylvania*

Public Utility Commission for the Issuance of an Ex Parte Emergency Order at P-2018-3000281 the Commission found that:

> As a formal complainant in his own proceeding, ***Senator Dinniman has full party status*** and may proceed with litigation before the Commission including exercising the right of discovery, the presentation of testimony and evidence, and the cross-examination of opposing witnesses.

Petition of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission for the Issuance of an Ex Parte Emergency Order P-2018-3000281, (Order entered May 3, 2018 at 12) (emphasis added).

7. Denied. Standing to participate in proceedings before an administrative agency ***is primarily within the discretion of the agency***. *Pennsylvania Natural Gas Association v. T.W. Phillips Gas and Oil Co., 75 Pa. PUC 598* (1991) (emphasis added).

Generally, Pennsylvania courts have held that a person or entity has standing when the person or entity has a direct, immediate, and substantial interest in the subject matter of a proceeding. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 282-284 (Pa. 1975). In *Pennsylvania Game Commission v. Department of Environmental Protection*, 555 A.2d 812 (Pa. 1989), the Pennsylvania Supreme Court described these terms as follows:

> The concept of 'standing' in its accurate legal sense, is concerned only with the question of who is entitled to make a legal challenge to the matter involved.... Although our law of standing is generally articulated in terms of whether a would-be litigant has a 'substantial interest' in the controverted matter, and whether he has been 'aggrieved' or 'adversely affected' by the action in question, we must remain mindful that the purpose of the 'standing' requirement is to insure that a legal challenge is by a proper party.... The terms 'substantial interest', 'aggrieved' and 'adversely affected' are the general, usual guides in that regard, but they are not the only ones. For example, when the legislature statutorily invests an agency with certain functions, duties and responsibilities, the agency has a legislatively conferred interest in such matters. From this it must follow that, unless the legislature has provided otherwise, such an

> agency has an implicit power to be a litigant in matters touching upon its concerns. In such circumstances the legislature has implicitly ordained that such an agency is a proper party litigant, i.e., that it has 'standing.'

555 A.2d at 815.

Legislators are granted standing in their official capacity to challenge agency actions that may implicate their legislative functions. *Fumo v. City of Philadelphia*, 972 A.2d 487, 497 (Pa. 2009); *Corman v. NCAA*, 74 A.3d 1149, 1161 (Pa. Cmwlth. 2013). "[L]egislators, as legislators, are granted standing to challenge executive actions when specific powers unique to their functions under the Constitution are diminished or interfered with." *Fumo v. City of Philadelphia*, 972 A.2d 487, 497 (Pa. 2009) (*citing Wilt v. Beal*, 363 A.2d 876, 881 (Pa. Cmwlth. 1976)) (granting legislative standing to state legislators in a challenge to an agency action implicating the General Assembly's authority to license submerged lands within the Commonwealth). "These duties have their origin in the Constitution and in that sense create constitutional powers to enforce those duties. Such powers are in addition to what we normally speak of as the constitutional rights enjoyed by all citizens." *Id.* Additionally, these powers may also be found in statute. *Corman v. NCAA*, 74 A.3d 1149 (Pa. Cmwlth. 2013). *See also* 52 Pa. Code § 1.21(b)(3), which permits officers of government entities to represent those entities before the Commission.

8. Admitted.

9. Denied. In support of this argument, Sunoco relies primarily on *Markham v. Wolf*, 136 A.3d 134 (Pa. 2016). Sunoco goes so far as to claim that *Markham* overruled prior precedent. It did not. Rather, by its very terms, *Markham* merely reviewed "our Commonwealth's prior caselaw applying these principals as they relate to legislators." 136 A.3d at 141. It neither set out to, nor did, overrule any of the prior case law on this issue.

Furthermore, *Markham* involved a facial challenge to an executive order before the Commonwealth Court in its original jurisdiction, not a proceeding before an administrative agency. The petitioners in that case claimed that the executive order was an "unqualified and improper intrusion upon one branch by another," constituted a "discernable and palpable infringement" on the legislators' authority as legislators, and that they were seeking to vindicate the voting rights of "every member of the General Assembly." 136 A.2d at 138-39. The court characterized petitioners claims as "legislators claiming an institutional injury." *Id.* at 140. The court found that in that case, petitioners were "not directly or substantially related to unique legislative prerogatives, but, rather, are generalized interests in the conduct of government common to the general citizenry." *Id.* at 146.

The court expressed that it was particularly concerned that allowing the general challenge to the executive order in Markham would "seemingly permit legislators to join in any litigation in which a court might interpret statutory language in a manner purportedly inconsistent with legislative intent" and that petitioners "offer no limiting principle which would permit their intervention in the instant matter. . . ." *Id.* at 145.

The case at bar deals with a very different situation than the one addressed in *Markham*. Rather, it deals with Complainant's "unique legislative prerogatives," and his interests far exceed those "common to the general citizenry". He represents a Senatorial District directly impacted to the project at issue in this matter. In his role as Senator, he sits on numerous Senate Committees responsible for water protection and public safety, including the standing Senate Environmental Resources and Energy Committee and the Joint Legislative Air and Water Pollution Control and Conservation Committee. He has the statutory authority to receive, review and comment upon the Governor's annual expenditure plan for the Environmental Stewardship Fund under 27

Pa.C.S. § 6104, which funds in part the Chester County Conservation District and its oversight of the watersheds and water supply of West Whiteland Township, and he receives annual, mandatory reports from the Commission under the Pennsylvania Public Utility Code. 66 Pa.C.S. §§ 320. And, in his official capacity as Senator, he served as a member of the Pennsylvania Pipeline Infrastructure Task Force, a group of experts and stakeholders that recommended policies, guidelines and best practices to guide expansion of pipeline infrastructure in the Commonwealth. He is also a resident of West Whiteland Township and a former County Commissioner, he possesses knowledge of a local perspective and the potential effects essential to a determination.

As Judge Barnes properly found:

> participation in this matter relates to his official duties as a Senator for the affected district. He is involved with several committees that address water issues. He has personal knowledge of the subject matter and has the responsibility of commenting on or approving expenditures related to water resources in Chester County. Consequently, Senator Dinniman's interest is direct because it will be adversely affected by the actions challenged in this Complaint and Emergency Petition. His interest is immediate because there is a close causal nexus between Senator Dinniman's asserted injury and the actions challenged. In addition, the interest is substantial because Senator Dinniman has a discernible interest other than the general interest of all citizens in seeking compliance with the law. Accordingly, the decision regarding this Emergency Petition will have a direct, immediate and substantial effect on Senator Dinniman.

Pennsylvania State Senator Dinniman, PUC Docket Nos. P-2018-30011453, C-2018-30011451 at 6.

10. Admitted in part and denied in part. It is admitted that the paragraph contains quoted language from *Markham*. It is expressly denied that recognizing Complainant's standing in this matter, "would seemingly permit legislatures to join in any litigation in which a court

might interpret statutory language in a matter purportedly inconsistent with legislative intent." The pending matter does not even deal with the consistency of statutory language with legislative intent. Moreover, this matter implicates Complainant's unique duties and roles. *See* response to Paragraph 9, above, which is incorporated herein by reference.

11. Denied as a legal conclusion. It is further denied that the issues in *Camille "Bud" George v. Pennsylvania Public Utility Commission*, 735 A.2d 1282 (Pa. Cmwlth. 1999) are applicable or analogous to the present case. In that case, Representative George did not claim standing based on his official capacity as a State Representative. Instead, he claimed standing based on a "***personal interest*** in having ***all*** ratepayers be provided with adequate notice." 735 A.2d at 1286 (emphasis added). He advanced no argument to explain how the Commission's action impacted his duties as a State Representative. *Id.*

12. Admitted in part and denied in part. It is admitted that, in support of his standing, Complainant has alleged that:

- He is a member of the General Assembly as a Senator and represents the 19th Senatorial District, which includes West Whiteland Township. The 19th District includes West Whiteland Township;
- He is the representative of the individuals in the 19th District affected by the project;
- He is a member of the standing Senate Environmental Resources and Energy Committee;
- He is a member of the Joint Legislative Air and Water Pollution Control and Conservation Committee;
- He served as a member of the Pennsylvania Pipeline Infrastructure Task Force, a group of experts and stakeholders that recommended policies, guidelines and best practices to guide expansion of pipeline infrastructure in the Commonwealth.

- He is a member of the General Assembly with the authority to receive, review and comment upon the Governor's annual expenditure plan for the Environmental Stewardship Fund under 27 Pa.C.S. § 6104, which funds in part the Chester County Conservation District and its oversight of the watersheds and water supply of West Whiteland Township;
- He receives annual, mandatory reports from the Commission under the Pennsylvania Public Utility Code. 66 Pa.C.S. § 320;
- He resides approximately two miles from ME1, ME2 and ME2X, and possesses knowledge of a local perspective on the potential effects essential to make a determination.

See Amended Formal Complaint, ¶¶ 11-13. It is denied that these facts are irrelevant or fail to establish standing. By way of further response, see response to Paragraph 9, above, which is incorporated herein by reference.

13. Denied. In its preliminary objections (as well as its other filings), Sunoco attempts to shoehorn this matter into the principals of a case dealing with a facial challenge to an executive order before the Commonwealth Court in its original jurisdiction, where petitioners were seeking to vindicate the voting rights of "every member of the General Assembly," 136 A.3d at 138-39, and were asserting "an institutional injury" that was "not directly or substantially related to unique legislative prerogatives, but, rather, are generalized interests in the conduct of government common to the general citizenry." *Id.* at 140, 146. In contrast, this matter deals with issues touching upon Complainant's specific Constitutional and statutory duties and concerns. *See Corman v. NCAA*, 74 A.3d 1149, 1161 (Pa. Cmwlth. 2013) (*en banc*). It is expressly denied that these are not legislative in nature or fail to grant Complainant standing.

14. Denied. It is denied that Complainant relies "solely on" the PUC's precedent in *Application of Artesian Water Pennsylvania, Inc.*, PUC Docket No. A-2014-2451241 (March 13, 2015) or that *Artesian* is distinguishable from the present case, or has been overruled by *Markham*. As set forth in Paragraph 9, above, which is incorporated herein by reference, *Markham* deals with very different types of claims than those presented here. In addition, *Markham* did not overrule anything. Rather, by its very terms, *Markham* merely reviewed "our Commonwealth's prior caselaw applying these principals as they relate to legislators." 136 A.3d at 141. It neither set out to, nor did, overrule any of the prior case law on this issue. In fact, it only reviewed case law related to the specific issues raised therein. It neither discussed nor cited the Commonwealth Court's *en banc* decision in *Corman,* or the issues raised therein.[1]

15. Denied. It is denied that in *Artesian,* Complainant did "not establish the stringent direct, immediate, and substantial interest necessary to bring a complaint."[2] On the contrary, in *Artesian,* the water company specifically argued that Complainant "has not identified any ***direct, immediate and substantial interest*** in the action he challenges . . . ." *Application of Artesian Water Pennsylvania, Inc.*, PUC Docket No. A-2014-2451241 (March 13, 2015) at 5. In granting Complainant standing, two administrative law judges rejected this argument and found that:

> Consequently, Senator Dinniman's interest is ***direct*** because it will be adversely affected by the actions challenged in this Protest. His interest is ***immediate*** because there is a close causal nexus between Senator Dinniman's asserted injury and the actions challenged in the Protest. In addition, the interest is ***substantial*** because Senator

[1] Sunoco appears to have abandoned its argument that the decision of the two administrative law judges in *Artesian,* finding that Complainant has standing and granting him party status, was "legal error". *See* Sunoco's "Bench Memorandum" on standing, p. 6.

[2] Sunoco identifies its ***erroneous*** allegation that Complainant was not required to establish a "direct, immediate and substantial interest" in *Artesian* as "critical" because "a protestant need not establish the stringent direct, immediate, and substantial interest necessary to bring a complaint." Sunoco's Preliminary Objections, ¶ 15.

> Dinniman has a discernible interest other than the general interest of all citizens in seeking compliance with the law. Accordingly, the decision regarding this Application will have a direct, immediate and substantial effect on Senator Dinniman.

Application of Artesian Water Pennsylvania, Inc., PUC Docket No. A-2014-2451241 (March 13, 2015) at 11 (emphasis added). Interestingly, *Markham*, the primary case relied upon by Sunoco for standing, similarly addressed "whether state legislators have standing to ***intervene*** in a challenge to the issuance of an executive order . . . ." 136 A.3d at 136 (emphasis added). It is further denied that a "protestant is akin to a commenter" which is allowed to file a comment without seeking party status, or that the decisions in *Artesian* and other cases "has no precedential value" in this matter.

16. Denied. It is denied that the court's decision on *Corman* "is wholly distinguishable" from the present case or shows that Complainant does not have standing. Therein the court examined the specific and unique official duties of Senator Corman and found that because of those duties, Senator Corman had standing. 74 A.3d 1161-62. Specifically, the court found that:

> Clearly, Senator Corman's statutory duties for overseeing Fund expenditures is a "matter [ ] touching upon [his] concerns." *Pennsylvania Game Comm'n*, 521 Pa. at 128, 555 A.2d at 815. As such, "the legislature has implicitly ordained that [Senator Corman, as Chair of the Senate Appropriations Committee,] is a proper party litigant, i.e., that [he] has 'standing.' " *Id.* Accordingly, we conclude that Senator Corman has standing.

Id. at 1161. The court further noted that Senator Corman was one of "10 General Assembly leaders from different political parties" with the specific authority that provided him standing in that matter. *Id.* at n. 16. Just as the court found in regard to Senator Corman, Complainant's interests in this matter far exceed those of the general population. *See* response to Paragraph 9, above, which is incorporated herein by reference.

17. Denied. On the contrary, as Administrative Law Judge Elizabeth Barnes has already ruled, Complainant has standing in this matter. *Pennsylvania State Senator Dinniman*, PUC Docket Nos. P-2018-30011453, C-2018-30011451 (May 21, 2018) at 6.

C. <u>Answer to Preliminary Objection #2: The Complaint Does Not Fail to Join Necessary Parties</u>

18. Denied. It is denied that that the Complaint failed to join any necessary parties.

19. Denied. The averments of this paragraph constitute conclusions of law to which no response is required. By way of further response, in *Pennsylvania Fish Commission v. Pleasant Tp.,* 388 A.2d 756 (Pa. Cmwlth. 1978), the court found that the Pennsylvania Department of Transportation was ***not*** a necessary party. *See also Com., Dept. of Transp. v. Pennsylvania Power & Light Co.*, 383 A.2d 1314, 1317 (Pa. Cmwlth. 1978) (To support its contention that the Authority is a necessary party, PP&L relied solely on the Authority's financial agreement regarding the project. Since PP&L failed to show any direct manner in which the Authority's rights or obligations must necessarily be determined by the outcome of this litigation, the court concluded that PP&L has failed to establish the requisite elements to find the Authority to be a necessary party).

20. Denied. It is denied that parties are necessary to this action or have "rights so connected to the claims of the litigants" because they allegedly have contracts to use the pipelines, to allegedly pay royalties to landowners for the withdrawal of material to be put in the pipelines, or because they allegedly receive delivery from the pipelines. As in *Pennsylvania Power & Light,* Sunoco relies solely on alleged financial agreements regarding the project, which are insufficient to establish these entities and individuals as necessary parties. Furthermore, if accepted, Sunoco's expansive view of necessary parties (i.e. anyone with a contract related to the material to be placed in the pipeline, including countless landowners who

allegedly are to receive royalties) would require the joinder of hundreds of parties to this action. Finally, the various parties Sunoco claims are necessary parties have notice of Complainant's action. In fact, a number of them, including Range Resources, testified in the hearing on the Petition for Interim Emergency Relief. Yet, despite this knowledge, to date only one of these so called "necessary parties" have even attempted to intervene in this matter.

21. Denied. It is denied that Complainant failed to join or give formal notice to any necessary parties, or that the Complaint should be dismissed.

D. Answer Preliminary Objection #3: Counts II, III, IV and V are Legally Sufficient

22. For the purpose of evaluating the legal sufficiency of the challenged pleading, all well-pleaded, material, and relevant facts alleged in the complaint and every inference that is fairly deducible from those facts must be accepted as true. *Mazur v. Trinity Area School Dist.*, 961 A.2d 96, 101 (Pa. 2008); *Marinoff v. Bell Telephone Co. of Pennsylvania*, 75 Pa. PUC 489, 491 (1991). A demurrer can only be sustained where the complaint is clearly insufficient to establish the pleader's right to relief. *Firing v. Kephart*, 353 A.2d 833 (Pa. 1976). If there is any doubt as to whether the preliminary objection should be sustained, that doubt should be resolved in overruling the demurrer. *Clevenstein v. Rizzuto*, 266 A.2d 623 (Pa. 1970); *Adams v. Speckman*, 122 A.2d 685 (Pa. 1956). The tribunal cannot consider matters collateral to the complaint, but must limit itself to such matters as appear therein, and an effort to supply facts missing from the objectionable pleading makes the preliminary objection in the nature of a demurrer an impermissible "speaking demurrer." *Armstrong County Memorial Hosp. v. Department of Public Welfare*, 67 A.3d 160 (Pa. Cmwlth 2013).

1) Count II is Legally Sufficient

23. Denied. Sunoco alleges that the Complaint seeks to have Sunoco "disclose its integrity management plan or risk assessment . . . ." In fact, the Complaint asks that "Sunoco fully conduct[] and release[] to the public ***a*** written integrity management program, risk analysis ***and any other information required to warn and protect the public from danger and to reduce the hazards to which the public may be subjected by reason of MEI, ME2 and ME2X*** . . . ." Amended Formal Complaint at 16. Sunoco claims it is unable to do this, and the Commission is unable to require this, under Public Utility Confidential Security Information Disclosure Act, 35 P.S. §§ 2141.1, *et seq.*, and the regulations thereunder, 52 Pa. Code §§ 102.1, *et seq.* This argument is flawed for numerous reasons. First, the Act only prohibits "***[a]n agency*** shall not ***release, publish or otherwise disclose*** a public utility record or portion thereof which contains confidential security information." 35 P.S. § 2141.5. It does not prevent Sunoco from releasing any information, nor is anything in the complaint to indicate that Sunoco's integrity management plan or risk assessment contains confidential security information. Rather, Sunoco relies on testimony of Matthew Gordon in support of this claim. Use of such testimony is an improper speaking demurrer and cannot be considered in support of Sunoco's preliminary objections. In addition, to the extent that this preliminary objection seeks to assert a claim of "illegality", such a claim is not a proper basis for a preliminary objection. *See DeAngeles v. Laughlin*, 258 A.2d 615 (Pa. 1969). Furthermore, Complainant does not seek the release of confidential information. Rather, to comply with Complainant's request, Sunoco can redact any confidential security information or prepare documents that exclude the confidential security information, and release and/or prepare such other non-confidential security information as is required to warn and protect the public from danger and to reduce the hazards to which the public may be subjected.

Rather than provide this information, Sunoco has chosen to hide behind the claims of "security" to produce virtually none of the requested information.

24. Denied. It is denied that Sunoco has no obligation to "use every reasonable effort to properly warn and protect the public from danger." The Complaint states that under 52 Pa. Code § 59.33(a) Sunoco is to "at all times use every reasonable effort to properly warn and protect the public from danger and shall take reasonable care to reduce the hazards to which employees, customers and others may be subjected by reason of its equipment and facilities." Amended Complaint ¶ 69. In an effort to get around this requirement, Sunoco claims that it is not a "public utility" under 52 Pa. Code § 59.33(a). Again, this argument is plagued by numerous flaws. First, Sunoco (without any case law to support its interpretation) relies on its interpretation of the definition of "public utility" in 52 Pa. Code § 59.1. It ignores the definition of "public utility" in 66 Pa. C.S. 102, under which the regulations are promulgated. It also ignores the definition of "hazardous liquid public utility" set forth in 52 Pa. Code § 59.33 itself, arguing that more specific term of "hazardous liquid public utility" is somehow broader than the more general term "public utility" used in the same section. It claims that "gas" (which is clearly included within the definition of "public utility" in 52 Pa. Code § 59.1) is not a "hazardous liquid" for the purposes of 52 Pa. Code 59.33, when the very definition of "hazardous liquid public utility" contained in 52 Pa. Code 59.33 defines a "hazardous liquid public utility" as "a person or corporation now or hereafter owning or operating in this Commonwealth equipment or facilities for transporting or conveying crude oil, ***gasoline***, petroleum or petroleum products, by pipeline or conduit, for the public for compensation." 52 Pa. Code 59.33(d) (emphasis added). Sunoco attempts to cherry pick the provisions that support its assertion while ignoring those that clearly show that the argument is without merit. Furthermore, the federal regulations (which

Sunoco concedes apply) require, among other things, "conducting drills with local emergency responders and adopting other management controls" in high consequence areas. *See* Amended Complaint, ¶ 71; 49 C.F.R. 195.452(i)(1).

25. Denied. See response to Paragraph 24, above, which is incorporated herein by reference. As set forth above, the definition of a "hazardous liquid public utility" in 52 Pa. Code 59.33(d) includes the transporting or conveying of "gasoline."

26. Denied. See responses to Paragraphs 24 and 25, above, which are incorporated herein by reference. As set forth above, Complainant does not seek the release of confidential information.

27. Denied. See responses to Paragraphs 24 and 25, which are incorporated herein by reference. By way of further response, ME2/ME2X are not separate and distinct from ME1. Rather, they are an "expansion" of Sunoco's existing pipeline systems for the purpose of interconnecting with existing Sunoco's Mariner East pipelines. As such, the integrity management plan should be immediately implemented.

2) Count III is Legally Sufficient

28. Denied. 49 CFR § 195.210(a) of the federal Pipeline and Hazardous Materials Safety Administration (PHMSA) regulations, incorporated by reference into the PUC regulations at 52 Pa. Code 59.33(b), provides that a "[p]ipeline right-of-way must be selected to avoid, as far as practicable, areas containing private dwellings, industrial buildings, and places of public assembly." Amended Complaint, ¶ 78. The Complaint alleges that Sunoco has failed to "avoid areas in and around West Whiteland Township containing private dwellings and places of public assembly. On the contrary, the ME2 and ME2X right of way goes directly through the yards and curtilage of private dwellings. The result has been to impact, and will continue to risk impact to,

private water supplies, houses and other buildings, their foundations, and their occupants." Amended Complaint, ¶ 78. It is denied that such a failure "is not a violation of this regulation or any other." Sunoco Preliminary Objections, ¶ 28.

29. Denied. 49 C.F.R. § 195.210(a) expressly and unequivocally requires that the pipeline right of way be selected to avoid, as far as practicable, areas containing private dwellings, industrial buildings and places of public safety. ***Only after*** such precautions are taken, and to the extent that portions of the right-of-way must remain in areas containing private dwellings, industrial buildings and places of public safety, must the pipeline company take the ***additional*** precautions set forth in 49 C.F.R. § 195.210(b). The Amended Complaint clearly alleges that Sunoco failed to meet the threshold requirements of avoiding areas in and around West Whiteland Township containing private dwellings and places of public assembly. Amended Complaint, ¶ 78. It clearly states a violation of the regulations.

30. Denied. A party asserting laches must establish two essential elements: (1) a delay arising from the complaining party's failure to exercise due diligence and (2) prejudice to the asserting party resulting from the delay. *Nigro v. City of Philadelphia*, 174 A.3d 693, 699 (2017). When raised by preliminary objections, laches "should never be declared unless the existence thereof is clear on the face of the record." *In re Marushak's Estate*, 413 A.2d 649 (Pa. 1980). Sunoco fails to meet any of these required elements.

31. Denied. Sunoco's allegations are not based on the face of the record. Rather, they are based on what Sunoco describes as "public knowledge since at least 2014 that the ME2/ME2X pipeline would be located in the right-of-way of the ME1 pipeline." It is further denied that "Complainant had all the information needed to bring a claim regarding the location of the pipelines over 4 years ago . . . ." or that he failed to exercise due diligence. Rather, the key

events that prompted Complainant's Complaint did not start until the summer of 2017 (i.e., the inadvertent returns) and did not culminate until November 2017 and March of 2018 (i.e., the development of sinkholes that, among other things, exposed ME1). Even without such factors, and under Sunoco's recitation of laches, Complainant's action was brought well within the six-year period that gives rise to a presumption of unreasonable delay. See Sunoco Preliminary Objections, ¶ 30.

32. Denied. It is denied that Sunoco has been prejudiced. Sunoco has been on notice of opposition to the pipeline from its outset. It has been the subject of numerous lawsuits. *See, e.g., Clean Air Council v. Sunoco Pipeline, L.P.*, C.C.P. Philadelphia, Docket No. 150803484 (filed August 2015); *Clean Air Council, et al. v. Sunoco Pipeline*, L.P., EHB Docket No. 2017009 (filed February 2017); *Delaware Riverkeeper Network v. Sunoco Pipeline, L.P.*, C.C.P. 2017-05040 (filed May 2017) (challenging siting of pipelines); *Flynn v. Sunoco Pipeline,* L.P., C.C.P. Delaware County, Docket No. CV-2017-004148 (filed May 2017) (challenging siting of the pipelines). Sunoco has been well aware of this opposition and yet chose to proceed with construction at its own risk. It cannot claim prejudice. Furthermore, Sunoco defended the actions in *Delaware Riverkeeper Network* and *Flynn*, by arguing that challengers' relief was before the Commission. Having directed challengers to the Commission, it cannot claim prejudice from challengers pursuing their action in the forum Sunoco demanded. Finally, it is denied that Sunoco's permits have already been acquired. On the contrary, permits for a significant amount of the construction in West Whiteland Township are still pending with the Department of Environmental Protection. It is expressly denied that this is the type of action laches was meant to bar.

3) Count IV is Legally Sufficient

33. Admitted in part and denied in part. It is admitted only that Count IV alleges that ME1 violates the PHMSA regulations that require that ME1 be located 48 feet underground West Whiteland Township, and that MEl is located at or around 24 inches or less, not 48 inches or more, within West Whiteland Township. *See* Amended Complaint, ¶¶ 82-85. It is denied that the regulations in question do not apply to ME1.

34. Denied. The averments of this paragraph constitute conclusions of law to which no response is required. By way of further response, it is expressly denied that Complainant seeks retroactive application of the PHMSA regulations. 49 CFR §195.200 provides that "[t]his subpart prescribes minimum requirements for constructing new pipeline systems with steel pipe, and for ***relocating, replacing, or otherwise changing existing pipeline systems*** that are constructed with steel pipe." (emphasis added). ME1 has been "changed" in two ways. First, In 2014, ME1 was changed to a Hazardous Liquids pipeline. Amended Complaint ¶ 24. In addition, ME1 is not separate and distinct from ME2/ME2X. Rather, by Sunoco's own admission, ME2/ME2X is an "expansion" of its existing pipeline systems. Such an expansion is a change to the existing pipeline system requiring compliance with 49 CFR §195.210(a).

Furthermore, in addition to the *per se* violation of the regulations, the failure of ME1 to comply with what are undisputedly modern pipeline standards, increases the risk of damage to the pipeline resulting from the construction activities associated with ME2 and ME2X and the risk of harm of residents and homes within West Whiteland Township. *See* Amended Complaint, ¶¶ 86-87.

35. Denied. The averments of this paragraph, including statements related to a 2014 PHMSA Advisory Bulletin purportedly addressing conversion of steel pipelines and statements

regarding Sunoco's alleged pressure testing of ME1, are based on alleged facts collateral to the complaint and constitute an impermissible "speaking demurrer." *Armstrong County Memorial Hosp. v. Department of Public Welfare*, 67 A.3d 160 (Pa. Cmwlth 2013). Complainant must be given the opportunity to investigate these issues, including, without limitation, the present validity and import of the four-year-old Advisory Bulletin and any other authority regarding this matter, the activities undertaken and allegedly undertaken by Sunoco in repurposing ME1, and other relevant facts.

36. Denied. See response to Paragraph 35, above, which is incorporated herein by reference. By way of further response, it is denied that Count IV of the Amended Complaint fails to allege violations of the regulations. On the contrary, Complainant expressly alleges that ME1 violates 49 CFR §§ 195.210 and 195.248, and is not reasonable or safe (*i.e.*, 66 Pa. C.S. §§ 1501, 1505(a)). *See* Amended Complaint, ¶¶ 81-87.

5) Count V is Legally Sufficient

37. Denied. It is denied that either the Commonwealth Court or the Commission has conclusively examined the question of whether Sunoco is a public utility for the purposes of ME1 or ME2/2X. All of the cases cited by Sunoco involve condemnation proceedings. It is well established that the authority of the courts to review certificates in such proceedings is extremely limited and that the courts have no authority "to review the public need for a proposed service by a public utility . . . ." *See, e.g., In re Sunoco Pipeline, L.P.*, 143 A.3d 1000, 1018 (Pa. Cmwlth 2016). Furthermore, it is denied that the opinions and orders cited by Sunoco resolve the question of whether the Mariner East pipelines are public utility facilities. Finally, for the purpose of preliminary objections, the Commission must accept the facts alleged in the

Complaint and all reasonable inferences that may be drawn therefrom as true. *Seeton v. Pennsylvania Game Com'n*, 937 A.2d 1028, n. 4 (Pa. 2007).

38. Denied. The averments of this paragraph constitute conclusions of law to which no response is required. By way of further response, it is denied that the Commission has issued a final determination or order regarding the status and/or present status of ME1, ME2 and ME2X.

39. Denied. Rather, it is black letter law that averments can be plead in the alternative. *See, e.g., Com., Dept. of Transp. v. Bethlehem Steel Corp.*, 380 A.2d 1308 (Pa. Cmwlth. 1977).

40. Denied. See response to Paragraph 37, above, which is incorporated herein by reference.

41. Denied. The Complaint speaks for itself. By way of further response, see response to Paragraph 37, above, which is incorporated herein by reference. By way of further response still, the Commission's October 2, 2014 Opinion and Order was a determination on preliminary objections filed in opposition to Sunoco's amended petitions. Accordingly, the Commission was required to view the amended petitions "in the light most favorable to Sunoco, the non-moving party . . . ." *Petitions of Sunoco Pipeline, L.P. for findings that buildings to shelter utility facilities are reasonably necessary for the convenience or welfare of the public*, Docket Nos. P-2014-2411841, et al., at 32. In the present case, the Commission must view the Complaint in the light most favorable to Complainant, the non-moving party.

42. Denied. The averments of this paragraph constitute conclusions of law to which no response is required. By way of further response, the Complaint speaks for itself. By way of

further response still, see response to Paragraphs 37 and 41, above, which is incorporated herein by reference.

43. Denied. The averments of this paragraph constitute conclusions of law to which no response is required. By way of further response, the Complaint speaks for itself. By way of further response still, see response to Paragraphs 37 and 41, above, which is incorporated herein by reference.

44. Denied. The averments of this paragraph constitute conclusions of law to which no response is required. By way of further response, the Complaint speaks for itself. By way of further response still, see response to Paragraphs 37 and 41, above, which is incorporated herein by reference.

45. Denied. The averments of this paragraph constitute conclusions of law to which no response is required. By way of further response, the Complaint speaks for itself. By way of further response still, see response to Paragraphs 37 and 41, above, which is incorporated herein by reference.

46. Denied. See response to Paragraphs 37 and 41, above, which is incorporated herein by reference. Sunoco's preliminary objections must be overruled.

WHEREFORE, Complainant respectfully requests that Sunoco's Preliminary Objections be overruled and that the Commission grant such other relief as it finds to be just and appropriate.

Respectfully submitted,
CURTIN & HEEFNER LLP

By: _____

Mark L. Freed
PA ID No. 63860

Date: May 31, 2018

Doylestown Commerce Center
2005 South Easton Road, Suite 100
Doylestown, PA 18901
Tel.: 267-898-0570
mlf@curtinheefner.com

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA STATE SENATOR ANDREW E. DINNIMAN,	:	
Complainant,	:	Docket No.: C-2018-3001451
	:	Docket No.: P-2018-3001453
v.	:	
SUNOCO PIPELINE, L.P.,	:	
Respondent.	:	

CERTIFICATE OF SERVICE

I hereby certify that I have, on this date, served a true and correct copy of the foregoing on the following:

Via electronic service

Thomas J. Sniscak, Esquire
Kevin J. McKeon, Esquire
Whitney E. Snyder, Esquire
Hawke, McKeon & Sniscak LLP
100 North Tenth Street
Harrisburg, PA 17101
tjsniscak@hmslegal.com
kjmckeon@hmslegal.com
wesnyder@hmslegal.com

Kathryn Urbanowicz, Esquire
Clean Air Council
135 South 19th Street, Suite 300
Philadelphia, PA 19103
kurbanowicz@cleanair.org

Virginia Marcille-Kerslake
103 Shoen Road
Exton, PA 19341
VKerslake@gmail.com

Robert Fox, Esquire
Neil Witkes, Esquire
Diana A. Silva, Esquire
Manko, Gold, Katcher & Fox, LLP
401 City Avenue, Suite 901
Bala Cynwyd, PA 19004
rfox@mankogold.com
nwitkes@mankogold.com
dsilva@mankogold.com

Respectfully submitted,
CURTIN & HEEFNER LLP

By: 

Date: May 31, 2018

Mark L. Freed
PA ID No. 63860
Joanna A. Waldron
PA ID No. 84768
Doylestown Commerce Center
2005 South Easton Road, Suite 100
Doylestown, PA 18901
Tel.: 267-898-0570
mlf@curtinheefner.com
jaw@curtinheefner.com